



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

October 23, 2012

REPLY TO THE ATTENTION OF:

C-14J

Kelly E. Richardson
Latham & Watkins
600 W. Broadway, Suite 1800
San Diego, CA 92101-3375

Re: Ashland Lakefront Site – Sediment Remedy

Dear Mr. Richardson:

Thank you for your letter dated October 15, 2012, on behalf of the Northern States Power Company of Wisconsin ("NSPW"), discussing the sediment remedy for the Ashland Lakefront Superfund Site in Ashland, Wisconsin ("Site"). Your letter forwards several documents including the "NSPW/Ashland Superfund Site Sediment Remedy Summary Report," and three reports by contractors commenting on the selected sediment remedy for the Site. The United States Environmental Protection Agency ("EPA") and the Wisconsin Department of Natural Resources ("WDNR") appreciated the opportunity to meet with NSPW and its contractor, Anchor QEA, in Chicago on October 15, 2012, to discuss the selected sediment remedy. Your letter and Anchor's presentation at the meeting focused on arguments that the selected hybrid remedy for sediments, as documented in EPA's September 30, 2010 Record of Decision ("ROD"), and supporting administrative record, is inconsistent with the National Contingency Plan, 40 C.F.R. Part 300. NSPW and Anchor have expressed concerns regarding the safety and implementability of dry dredging the nearshore sediments due to "basal heave," or a catastrophic failure of the lakebed due to artesian pressures, as well as wall collapse, fracturing of the aquitard, release of pressurized water into the excavation, and costs. EPA and WDNR will carefully consider the information you have submitted. While that review is ongoing, I felt it important to immediately clarify for the record several issues raised in your letter, namely how and when the issue of basal heave was first brought to EPA's attention, how this issue led to the report by EPA's oversight contractor, Weston Solutions, Inc. ("Weston"), titled "Conceptual Geotechnical Assessment For Sediment Removal at the Ashland/Northern States Power Lakefront Site in Ashland, Wisconsin" and dated November 20, 2009 ("Weston Memo"), and how the Weston Memo was used by EPA in responding to comments received from NSPW and its contractors on EPA's Proposed Plan for the Site dated June 2009.

EPA's preferred alternative for sediments presented in the Proposed Plan, and the final remedy selected for sediments documented in the ROD, was based on the Remedial Investigation and Feasibility Study ("RI/FS") conducted by NSPW and its contractor under the Administrative Order on Consent with EPA dated November 14, 2003. NSPW's RI/FS identified and evaluated the dry dredge/wet dredge hybrid sediment remedy that EPA ultimately selected. NSPW's RI/FS did not, however, identify or evaluate basal heave. EPA approved NSPW's final Feasibility Study on December 4, 2008. NSPW first raised basal heave to EPA and WDNR in a technical

meeting on May 29, 2009, just days before EPA issued the Proposed Plan dated June 2009. On June 1, 2009, NSPW's then-contractor, Foth, issued a draft memorandum ("Foth Draft Memorandum"), presenting a preliminary analysis of the potential for basal heave that called for further analysis of historical and site geotechnical information and possibly additional site borings. NSPW then raised safety concerns with a dry dredge sediment remedy due to basal heave in its August 17, 2009 comments on the Proposed Plan. Finally, the contracting firms of DCI Environmental, Severson Environmental, and Burns & McDonnell raised safety concerns with a dry dredge sediment remedy due to basal heave in their August 17, 2009 comments on the Proposed Plan.

Despite the fact that NSPW had been evaluating sediment remedial alternatives for over five years, basal heave was not identified as a potential issue until after NSPW submitted, and EPA approved, the final Feasibility Study. Basal heave was raised by NSPW and its contractors for the first time just prior to EPA's issuance of the Proposed Plan and in comments on the Proposed Plan. Because basal heave was raised at the last possible minute without the benefit of having been fully evaluated during the RI/FS, EPA felt it necessary to evaluate this issue itself and tasked Weston to review the basal heave issue raised in the Foth Draft Memorandum and in the public comments. This effort resulted in the Weston Memo. EPA considered the Weston Memo along with the comments received and selected the final sediment remedy as documented in the ROD. EPA also responded to the comments received as part of its responsiveness summary attached to the ROD as Appendix A.

Your letter implies that EPA had Weston evaluate the basal heave issue in secret and then improperly held the results from NSPW and the public until after the ROD was issued. Your letter states "[a]lthough the report is dated November 20, 2009 (after the close of the public comment period for the Proposed Plan on August 17, 2009), it was not provided to NSPW until more than a year later in October 2010, *after the ROD was issued.*" (emphasis in the original) The Weston Memo was developed in response to new information contained in the Foth Draft Memorandum submitted to EPA in June 2009, and in response to the public comments on the Proposed Plan. EPA used the Weston Memo to evaluate the issues raised in the Foth Draft Memorandum and in the public comments prior to selecting the sediment remedy and issuing the ROD. Because the Weston Memo was developed by EPA's oversight contractor for the purpose of helping EPA evaluate public comments it would have to be dated after the close of the comment period. What is relevant is that the Weston Memo was finalized and considered by EPA to help it evaluate the basal heave issue prior to selecting the final sediment remedy in September 2010. Furthermore, because the Weston Memo was developed to assist EPA in its evaluation of basal heave, and helped form the basis for EPA's selection of the final sediment remedy, it was added to the administrative record as document number 11, to Update #2, which was finalized at the time the ROD was signed on September 30, 2010. This is not only proper, but shows that EPA carefully considered NSPW's comments before selecting the sediment remedy and concurrently finalizing the administrative record. Any implication that EPA conducted a secret review and hid the results from NSPW and the public is misleading and does not reflect the facts or the remedy selection and public participation process under CERCLA.

Attachment 2 to your letter states that in July 2009, EPA staff indicated in meetings with NSPW that they shared concerns regarding the safety of the sediment remedy. NSPW/Ashland

Superfund Site Sediment Remedy Summary Report, Attachment 2, at 5. EPA is always concerned with ensuring the safety and implementability of any remedy it selects. In this case NSPW raised a new safety issue that was not evaluated during the RI/FS NSPW performed, and for which there was a lack of site-specific data to fully evaluate the risks. The Foth Draft Memorandum that first identified these issues states it is a preliminary geotechnical analysis, and recognized the need for additional sampling and data specific to the basal heave and other geotechnical structural design issues. The Foth Draft Memorandum states new data can be collected using standard drilling techniques and that "[a]ny work plan for collecting these data should incorporate the need to confirm the issues related to basal heave risks (aquitard thickness, consistency and stability) as well as sediment and subgrade geotechnical characteristics associated with wet removal of sediment." Foth Draft Memorandum, at 3. Since the Weston Memo was reviewing the Foth Draft Memorandum and available data, it is likewise described as a "preliminary assessment of potential design and construction issues," as your letter and supporting materials repeatedly emphasize. Due to the lack of data on the soil and sediment profile underlying the excavation area (data that are critical to a full evaluation of bottom upheaval and related issues), in July 2009, EPA and WDNR requested that NSPW conduct sampling specifically to evaluate basal heave. That sampling still has not been conducted and data do not exist to fully evaluate basal heave and related risks. The written reports by the three contractors, including Anchor, that you now submit had access to the data available to Foth and Weston in 2009, as well as new data collected by Burns and McDonnell in 2011 as part of the *Data Gap Investigation Report*, however, none of these data were specifically collected to evaluate basal heave and related geotechnical issues and may not be adequate for this purpose. In the normal course of remedy development, this information would be collected during the remedial design phase of the process. In its response to the public comment that the dry dredge remedy presents safety and environmental impact concerns from basal heave, EPA stated "in order for the final design of the dry excavation alternative to be properly completed, additional geotechnical data on the clay layer in the Chequamegon Bay is required. Therefore, EPA will ensure that the issue of basal heave is thoroughly investigated and evaluated during the pre-design phase." ROD, Appendix A, at A-16.

Finally, your letter requests that all of the materials submitted with your October 15th letter be added to the administrative record for the selected remedy. Despite the fact that the public comment period on the selected remedy closed in 2009, you state this is appropriate because NSPW did not have an opportunity to comment on the Weston Memo, and your October 15th submittal presents new and material information. Under 40 C.F.R. §300.825(a), EPA may add documents to the administrative record after the ROD is signed if: 1) the documents concern a portion of a response action decision that the ROD does not address; or 2) an explanation of significant difference or ROD amendment is issued, in which case all documents that form the basis for the decision to modify the selected remedy shall be added. At this time neither of the circumstances described above apply that would cause EPA to add the materials you have submitted to the administrative record. If in the future EPA modifies the selected sediment remedy, and the information in your October 15th letter forms a basis for that decision, EPA will add your letter and supporting materials to the administrative record. Under 40 C.F.R. § 300.825(c), EPA must consider comments submitted after the close of the public comment period only to the extent that the comments contain significant information not contained elsewhere in the administrative record file which could not have been submitted during the

public comment period and which substantially support the need to significantly alter the response action. As I stated above, EPA and WDNR are reviewing the information you submitted and if it contains significant information not contained elsewhere in the record which could not have been submitted during the comment period and which substantially support the need to significantly alter the selected sediment remedy, then EPA will add your submittal to the record.

Sincerely,



Craig Melodia
Associate Regional Counsel

cc: Lacey Cochart, WDNR